"But it was suggested that three days' notice given of a resolution by a shareholder would do instead of the notice specified in clause 45. In my opinion it would not. The notice given by clause 45 is to be given to every shareholder. The notice given by clause 46 is only to be left at the registered office of the Company, the one is seven days' notice and the other is three days' notice. It is plain to me that the notice to be given under clause 46 is something ancilliary or subsidiary, which could be properly brought under the terms of the notice convening the meeting, and therefore the resolution passed at the first meeting was passed on a bad notice."

I would, with respect, adopt the argument in this judgment and hold that the resolution removing all the directors and electing the appellants and four others as directors at the annual general meeting held on September 30 and October 1, was passed on a bad notice. In the circumstances, the question of duress or the validity of the election of directors at the meeting held on October 29, 1966 becomes a matter of academic interest only and I need not consider them. The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Morris Edgar & Co.*

PUBLIC PROSECUTOR v. LEONG KOW CHAI

[A.Cr.J. (Chang Min Tat J.) April 27, 1968]
[Ipoh — Criminal Appeal No. 7 of 1968]

Road Traffic — Using car as public service vehicle — No insurance cover for such user — Road Traffic Ordinance, 1958, ss. 74(2), 92(1) & 144.

Criminal Procedure — Joinder of trial — Charges under ss. 74 & 92, Road Traffic Ordinance, 1958 — Criminal Procedure Code (Cap. 6), s. 165(1).

The respondent was charged under section 92(1) of the Road Traffic Ordinance, 1958, for using his car as a public service vehicle (hereinafter referred to as the pirate-taxi charge) and under section 74(2) of the Ordinance, for using the car as a public service vehicle without there being in force a policy of insurance for such user (hereinafter referred to as the insurance charge). Both charges were tried together. At the close of the case for the prosecution, the magistrate called for the defence on the pirate-taxi charge, but discharged the respondent under the provisions of section 173(g) of the Criminal Procedure Code (Cap. 6) in respect of the insurance charge. The magistrate relied on the case of *Ali bin Hassan* v. *Public Prosecutor* [1] to justify his decision not to call on the defence in respect of the insurance charge. The public prosecutor appealed against the order of discharge.

Held, setting aside the order of discharge: having regard to the fact that both offences were committed in one and the same transaction, the joinder under section 165(1) of the Criminal Procedure Code, of the insurance charge and the pirate-taxi charge in the same trial was proper.

Ali bin Hassan v. *Public Prosecutor,*[1] not followed.

Cases referred to:—

(1) *Ali bin Hassan* v. *Public Prosecutor* [1967] 2 M.L.J. 76.

(2) *Khoo Teck Yam* v. *Public Prosecutor* [1955] M.L.J. 112.

(3) *Darus* v. *Public Prosecutor* [1964] M.L.J. 146.

MAGISTRATE'S CRIMINAL APPEAL.

Eusoff bin Chin (Deputy Public Prosecutor) for the appellant.

S. A. Lingam for the respondent.

Chang Min Tat J.: The respondent was charged in the magistrate's court at Ipoh with using his car BG 6576 on 7th February, 1967, in Ipoh as a public service vehicle, an offence under section 92(1) of the Road Traffic Ordinance (hereinafter referred to as the pirate-taxi charge) and with using such vehicle at the same time and place as a public service vehicle without there being in force a policy of insurance for such user, an offence under section 74(2) of the Road Traffic Ordinance (hereinafter referred to as the insurance charge).

On the fact of user, the evidence adduced by the prosecution, besides the evidence of groundwork observation, was to the effect that at the time and place mentioned in the charge the defendant was stopped by the police, there were in his car 2 male and a female Chinese. On the question of insurance cover, the investigation officer produced a policy of insurance for the vehicle for cover against third party risks for user as a private vehicle, obtained by him from the respondent. This policy was identified by a representative of its issuer and, further, the enforcement officer of the Road Traffic Department was called to give evidence of the registered ownership of the vehicle in the respondent and he confirmed the type of insurance cover issued for its user.

On this evidence, the learned magistrate, at the close of the case for the prosecution, called for the defence on the pirate-taxi charge, but discharged the respondent under the provisions of section 173(g) of the Criminal Procedure Code (Cap. 6) in respect of the insurance charge. Under section 173(g), he has undoubtedly the power to discharge any accused at any stage of the proceedings if, for reasons to be stated, he considers the charge to be groundless, but it goes without saying that the power is to be exercised judicially.

The record is silent as to the reasons which induced the learned magistrate to do so. Read carefully and for its precise effect, that section imposes on a magistrate a duty to record the reasons he considers the charge to be groundless. To my mind, the recording of his reasons must be done at the stage when the learned magistrate decides to act under section 173(g) of the Criminal Procedure Code and not afterwards, for example in his grounds of judgment, and after notice of appeal has been lodged. Failure to do so at the relevant time is not, in my view, a proper discharge of his judicial functions.

Furthermore, the record is silent as to the submissions, if any, made by both sides, before the magistrate came to his decision. Inasmuch as he did, at the close of the case for the defence, record the submissions by counsel for the defence, as well as by the prosecuting officer, I must come to the conclusion that no submission of no case to meet was, in fact, made by counsel for the defence at the close of the case for the prosecution and no opportunity was afforded to the prosecuting officer to speak on the matter. The magistrate appeared to have acted entirely on his own initiative.

Be that as it may, against the order of discharge, the public prosecutor now appeals. There is no appeal by the respondent against his subsequent conviction on the pirate-taxi charge.

When he came to write his grounds of judgment, the learned magistrate expressed himself as relying entirely on the judgment of Ali J. in *Ali bin Hassan* v. *Public Prosecutor*,[1] to justify his decision not to call on the defence in respect of the insurance charge.

In his judgment, Ali J. strongly criticised the joinder of the insurance charge with the pirate-taxi charge in one and the same trial. He held that such joinder, though permitted under section 165(1) of the Criminal Procedure Code, was contrary to the principle in section 163 of the Criminal Procedure Code. He reasoned that since the presumption under section 144 of the Road Traffic Ordinance, on which the prosecution relied, was relevant to a pirate-taxi charge but could not be raised on an insurance charge, such joinder was prejudicial to the defence. The reasoning was predicated on the absence of any positive evidence in the prosecution case of user as a pirate-taxi which, had it not been for the presumption, would have entitled the defence to submit, and to submit successfully, at the end of the case for the prosecution, of no case to meet not only on the pirate-taxi charge but also on the insurance charge, and on his finding, in the final analysis, that there was insufficient evidence to support the conviction on the insurance charge.

I called for the record of appeal in *Ali bin Hassan's* case, *supra*, and find that the only evidence adduced by the prosecution on the insurance charge was through the investigating officer, Inspector Sofian bin Mohamed (P.W.1), who stated:—

> "From my inquiries the car had been insured on a comprehensive policy with China Insurance Co. Ltd. I tender the duplicate copy of the policy (P.6)."

Quite clearly, what was said to the police inspector in the course of his investigations was inadmissible in evidence, and equally clearly, the duplicate copy of the policy was not sufficiently identified to be properly admitted. There was thus in *Ali bin Hassan's* case [1] no admissible evidence of the insurance cover taken for the user, and since it was not for the court to speculate as to the nature of the insurance cover taken out, the trial magistrate or an appellate court could reasonably come to the conclusion that there was in that case no evidence to support the conviction on the insurance charge.

The relevant part of Ali J.'s judgment is in these words:—

> "But in cases where it becomes necessary because of insufficient evidence to rely on the presumption it would be improper to have the insurance charge tried at the same trial. I say "improper" because the joinder of the charges would be contrary to the principle contained in section 163 of the Criminal Procedure Code. This section was enacted to ensure that an accused person is given a fair trial. The requirement for a separate charge and a separate trial is clearly to ensure that an accused person understands not only the allegation made against him but also the nature of the evidence supporting the allegation. In the instant case the appellant, who was not defended at the trial, was placed in the unhappy position of having to rebut the presumption of law on one hand and a presumption of facts on the other. In such a situation he could not have understood the nature of the evidence that would go in support of the 1st charge and the nature of the evidence that would go in support of the insurance charge. The trial magistrate was clearly unaware of the predicament in which the appellant was placed, and being so unaware had probably assumed that the conviction on the 1st charge must necessarily lead to the conviction on the insurance charge. All this could have been avoided if each of the charges had been tried separately. In the final analysis I feel compelled to conclude that there was insufficient evidence to support the conviction on the 3rd charge."

On this, the learned judge set aside the conviction on the insurance charge and ordered a retrial.

The learned magistrate might judicially have felt himself bound by a decision of the High Court, but inasmuch as the decision of Ali J. was to the effect that a joinder of charges was improper, I am in some amazement that the learned magistrate could and did apply it to find the charge groundless. It would have been another matter and quite understandable if, at the commencement of the trial, he had acted on the judgment and ordered a separate trial of the 2 charges.

With every respect, I find myself in grave doubts as to whether a joinder in a case such as this operates to the prejudice of the respondent, and whether the respondent would, in fact, have to rebut a presumption of law on the one hand and a presumption of facts on the other. The presumption is a presumption of law in the sense that it is a statutory presumption, raised by an express enactment of the Legislature, and what it does is to raise on a proved fact, or set facts, the presumption as stated in the enactment so that factually the presumption is of a state of facts. Thus, under section 114 (a) of the Evidence Ordinance, a presumption of law is statutorily enacted and upon proof of the fact that a man is in possession of stolen

goods soon after the theft, the presumption raised is of a fact that he is either the thief or has received the goods knowing them to be stolen. The presumption is a presumptive fact and rebuttable by an account for his possession. Similarly, under section 144 of the Road Traffic Ordinance, the presumption (which, I repeat, is a statutory invention and there is, in this sense, a presumption of law) is one of a fact, that upon proof of conveyance of persons in a vehicle, the presumption is that the conveyance was for hire or reward. Confusion would be avoided if it is realised that while a presumption is a presumption of law, the presumption is as to a fact, and that a presumption of facts (so-called) is in reality an inference to be drawn from facts.

When the defence is called on both the pirate-taxi and insurance charges, the accused has to rebut the presumption of law or a presumptive fact and the inference drawn from the presumptive fact, and if he can show that the conveyance of persons in a motor vehicle was not for hire or reward, for example by showing that the conveyance was of persons from whom he would not reasonably obtain, or be expected to obtain, payment, then he has rebutted the presumption of law as to a fact, and he is entitled to be acquitted of the charge of operating a pirate-taxi and also, without more, of the insurance charge. If he fails to rebut the presumption of law with regard to the conveyance of persons for hire or reward, he could nevertheless answer the charge by producing an adequate insurance cover for such user: see *Khoo Teck Yam* v. *Public Prosecutor*.[2] Perhaps because of the inherent improbability of expecting anyone who is prepared to flout the law and operate a public service vehicle without a valid licence to legalise part of his illegal operation by taking out an insurance cover for commercial use, the result would be a conviction on the insurance charge if the presumption under section 144 of the Road Traffic Ordinance is not rebutted of conveyance for hire or reward. But the same set of facts will acquit or convict the accused on both charges.

That is (if I may say so without disrespect) perhaps the reasoning behind Ong J.'s (as he then was) *dictum* in the case of *Darus* v. *Public Prosecutor*,[3] that conviction under the pirate-taxi charge on the evidence produced makes conviction under the insurance charge inevitable. In distinguishing his judgment from that of Ong J. in *Darus'* case, *supra*, Ali J. assumed that the conviction on the insurance charge was inevitable because Ong J. was satisfied that the same evidence that went in support of the pirate-taxi charge was, without the aid of the presumption, sufficient to support the other charge.

I have also called for the record in *Darus'* case, *supra*, and I find that the evidence was, as in this case, evidence of groundwork observation, evidence of conveyance of passengers at the time and place in the charge, and evidence that the insurance cover issued for the vehicle in question was for private user. There was the additional evidence of the three passengers in the case, but all three denied that they paid or intended to pay Darus for the conveyance. Their evidence was, therefore negative. Admittedly, objection was not taken in that case that the joinder was wrong or prejudicial, but the point is that Ali J. was, with the greatest of respect, wrong in his assumption.

For myself, I cannot agree that the joinder is wrong or prejudicial. The joinder appears to me wholly proper, having regard to the fact that both offences were committed in one and the same transaction. Perhaps, too, the accused might appreciate that such joinder would relieve him of the hardship of having to stand his trial on two charges on two separate occasions.

On the evidence adduced in this case, I consider that the learned magistrate is in error in holding, as he did, that the charge was groundless. The order of discharge is set aside and the case is remitted to him to call on the defence on the insurance charge.

I would indicate, in view of the conflict of judicial decision, that I am prepared to give a certificate to go to the Federal Court.

Order accordingly.

CHAMPION MOTORS (M) LTD. v. LEONG SIEW KWAN

[A.C.J. (Pawan Ahmad J.) April 27, 1968]

[Malacca — Civil Appeal No. 5 of 1966]

Landlord and Tenant — Controlled premises — Notice to quit sent by registered post to premises — Tenant not in occupation of premises — Whether tenancy terminated — Action for trespass against occupier who was in occupation with permission of tenant — Control of Rent Ordinance, 1956.

Where the tenant is not in actual possession of the premises, the mere proof that the notice to quit had been sent by registered post to the tenant, addressed to the premises is insufficient to establish that the tenancy had been lawfully terminated. It must be further proved that the notice had in fact been brought to the knowledge of the tenant.

The appellant, landlord of the premises, sent a notice to quit by registered post to the tenant, addressed to the premises. The tenant had vacated the premises some nine years earlier and was residing elsewhere. In an action for trespass against the respondent (the son of the tenant) who was in occupation of the premises with the permission and authority of the tenant,

Held, dismissing the appeal: the action for trespass could not be maintained as the tenancy had not been lawfully terminated.

Cases referred to:—

(1) *Lim Kien Mok* v. *B. H. Kevan* [1963] M.L.J. 284.

(2) *Kam Sam Mooi* v. *Shin Heong Long* [1959] M.L.J. 249.